

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-829

LEILA MOURNING,

Petitioner,

—v.—

FAMILY PUBLICATIONS SERVICE, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

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**CHRONOLOGICAL LIST OF
RELEVANT DOCKET ENTRIES**

April 23, 1970—Plaintiff's original complaint filed in U.S. District Court for the Southern District of Florida

July 10, 1970—Plaintiff's second amended complaint filed

July 20, 1970—Defendant's answer to second amended complaint filed

October 30, 1970—Order entered granting plaintiff's motion for summary judgment, and denying defendant's motion for summary judgment

November 27, 1970—Judgment of District Court entered, awarding plaintiff the sum of \$100 plus costs and attorney's fees

December 11, 1970—Defendant's notice of appeal filed

September 27, 1971—Opinion and judgment of the Court of Appeals for the Fifth Circuit

**UNITED STATES FEDERAL COURT
SOUTHERN DISTRICT OF FLORIDA**

Case No. 70-559-Civ-WM

**LEILA MOURNING, and all persons similarly situated,
PLAINTIFF**

v.

FAMILY PUBLICATIONS SERVICE, INC., DEFENDANT

Filed July 10, 1970

SECOND AMENDED COMPLAINT

COMES NOW, the Plaintiff, LEILA MOURNING, and all persons similarly situated, by and through her undersigned attorneys and sues the Defendant, FAMILY PUBLICATIONS SERVICE, INC., and alleges:

I JURISDICTION

1. Jurisdiction of this Court is invoked pursuant to Title I of the U.S. Consumer Credit Protection Act, 15 U.S.C. Section 1601 et seq.

2. The Plaintiff, LEILA MOURNING, is a 73 year old widow having her domicile in Dade County, Florida.

3. Defendant, FAMILY PUBLICATIONS SERVICE, INC., is a foreign corporation doing business in the State of Florida; and is a creditor within the purview of the Truth-in-Lending Act (15 U.S.C. Section 1601 et seq), and Regulation Z, 12 C.F.R. 226 which governs the enforcement of that Act.

4. Plaintiff brings this action pursuant to Rule 23 of the Federal Rules of Civil Procedure on behalf of herself and all other persons similarly situated. Plaintiff

is a member of a class composed of consumers in or about Dade County, Florida, who subsequent to July 1, 1969, entered into a written standard form contract with the Defendant, which violated the Truth-in-Lending Act, 15 U.S.C. Section 1601 et seq., and 12 C.F.R. 226. The persons in this class are so numerous that joinder of all members is impracticable; there are questions of law and fact common to all members of the class; the claims of the representative party are typical of the claims of the class and the representative party will fairly and adequately protect the interest of the class.

The alternative requirement of the class action as set out in Rule 23(b) (3) is met since the Defendant entered into a substantially identical contract with all members of the class. The damages claimed by each member of the class are identical. Therefore, the questions of law and fact common to the class dominates over any questions that might affect any individual member of the class.

II STATEMENT OF CLAIMS

5. Plaintiff entered into a written contract with the Defendant for the purchase of magazines, on or about August 19, 1969 (a copy of said contract is attached hereto and hereby made a part hereof; as Plaintiff's Exhibit 1). The standard form contract required the Plaintiff, LEILA MOURNING, to make thirty (30) monthly payment of three dollars and ninety-five cents (\$3.95) each, in return for which she would receive the magazines for sixty (60) months. Said contract is the only instrument executed and existing between the parties.

6. Said contract fails to contain a disclosure as to the total purchase price, finance charges, service charges or the amount to be financed, all of which causes the contract to be in violation of the Truth-in-Lending Act, 15 U.S.C. Section 1601 et seq. Defendant never advised Plaintiff of omission of required disclosures and Plaintiff never agreed to waive same.

4

7. In the ordinary course of business, Defendant, **FAMILY PUBLICATIONS SERVICE, INC.**, extends Consumer Credit as defined in Regulation Z, 12 C.F.R. 226.2(K) as was duly promulgated by the Board of Governors of the Federal Reserve System pursuant to Title I of the U.S. Consumer Credit Protection Act, 15 U.S.C. Section 1601 et seq.

8. Under these contracts, the Defendant, **FAMILY PUBLICATIONS SERVICE, INC.**, in the ordinary course of their business is a creditor as that term is defined in Regulation Z, 12 C.F.R. 226.2(m) the regulation promulgated under the Federal Truth-in-Lending Act, 15 U.S.C. Section 1601 et seq.

9. In the ordinary course of business, Defendant, **FAMILY PUBLICATIONS SERVICE, INC.**, as a creditor as defined by 12 C.F.R. 226 has failed to make the following mandatory disclosures:

- | | |
|-----------------------------------|------------------------|
| 1. "Cash price" | 12 C.F.R. 226.8(C) (1) |
| 2. "Cash downpayment" | 12 C.F.R. 226.8(C) (2) |
| 3. "Unpaid balance of cash price" | 12 C.F.R. 226.8(C) (3) |
| 4. "Amount financed" | 12 C.F.R. 226.8(C) (7) |
| 5. "Date payments are to begin" | 12 C.F.R. 226.8(b) (1) |
| 6. "Total of payments" | 12 C.F.R. 226.8(8) |

7. Defendants failed to make these disclosures prior to consummating the transaction as required by 12 C.F.R. 226.8(A).

15 U.S.C. Section 1638, Defendant was required to make these disclosures in the contracts made with the Plaintiff, but failed to do so in violation of the Federal Truth-in-Lending Act and its regulations.

10. Defendant corporation, acting individually and as agent for various publishers used the telephone and sales personnel to solicit business; and did so act in relation to Plaintiff's herein.

WHEREFORE the Plaintiff demands that the Court take jurisdiction of the parties and all matters herein, enter judgment for Plaintiff and order Defendant to pay penalties pursuant to applicable statutory provisions, plus the reasonable attorneys fees and costs, and any other remedies deemed proper by Court herein.

**ECONOMIC OPPORTUNITY LEGAL
SERVICES**

By /s/ Philip L. Coller
PHILIP L. COLLER, ESQUIRE
SALLY WEINTRAUB, ESQUIRE
Attorneys for Plaintiff

**ECONOMIC OPPORTUNITY
 LEGAL SERVICES
 PROGRAM, INC.**
 17480 South Dixie Highway
 Perrine, Florida 33157
 Telephone: 233-1850

OF COUNSEL:

ELIZABETH DU FRESNE
ECONOMIC OPPORTUNITY LEGAL
SERVICES PROGRAM, INC.
 395 Northwest First Street
 Miami, Florida 33128
 Telephone: 379-0822

I HEREBY CERTIFY that a true and correct copy of the foregoing instrument was mailed to **FRATES FAY FLOYD & PEARSON**, Twelfth Floor Concord Building, Miami, Florida, this 8th day of July, 1970.

/s/ Philip L. Coller
PHILIP L. COLLER

Contract No. 880 L-44

Please Make Checks Payable To

FAMILY PUBLICATIONS SERVICE, Inc.

Code If correspondence is necessary please address to branch office below.

			If renewal check box
LF	Life Magazine	260	Issues <input type="checkbox"/>
			Issues <input type="checkbox"/>
LH	Ladies Home Journal	60	Issues <input type="checkbox"/>
US	Travel & Camera	60	Issues <input type="checkbox"/>
HL	Holiday	60	Issues <input type="checkbox"/>
			Issues <input type="checkbox"/>
			Issues <input type="checkbox"/>
			Issues <input type="checkbox"/>

This Order Guaranteed by a \$6,000 Bond Deposited with Central Registry, N.Y.C.

PAY ONLY \$3.95 NOW

Pay collector \$3.95 each month for 30 months

All amounts plus tax if any

Nothing to be paid for remaining 30 months

Sales agent forbidden to accept more than down payment of \$3.95

Verbal Agreements Not Recognized

No magazines delivered by sales agent

All issues specified mailed direct from Publisher

Please accept my order for the magazines selected above for the terms indicated.

I have paid sales agent a down payment of \$3.95 and agree to pay Family Publications Service, Inc., 30 equal instalments of \$3.95 each month for 30 consecutive months.

Payments to be made to collector when he calls or by mail to Teaneck, N.J. (07666) or to your branch office at

Family Publications Service, Inc.
402 Plaza Building, 245 S.E. First Street
Miami, Florida 33131

This Contract Is Not Subject To Change or Cancellation after acceptance or verification

All contracts received subject to approval and acceptance at the home office of Family Publications Service, Teaneck, N.J. Payments due monthly, otherwise entire balance due. You Agree To Notify Us Before Changing Address.

Subscriber **Miss**
Signature **Mrs.**
Mr. /s/ L. Mourning
(Representative is not permitted to sign subscriber's name)

Name (print) Mrs. Leila Mourning

Own Mailing
4 yrs Address (print) 15295 Garfield Dr.

Apt. No. — Phone No. 247-1652

City (print) Homestead State Fla Zip Code 33080

Occupation
& Business Retired

Business address ———— **Business**
Phone No. ————

Sales agent Cooney Date 8-10-69

Subscriber's
Verification Signature /s/ L. Mourning

Verified by /s/ Charles Escalanto Date 8-19-69

Fill In Collection Address on
Reverse Side

Exhibit 1

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION**

NO: 70-559-Civ-WM

Filed July 20, 1970

**LEILA MOURNING, and all persons similarly situated,
PLAINTIFF**

v.

FAMILY PUBLICATIONS SERVICE, INC., DEFENDANT

ANSWER TO SECOND AMENDED COMPLAINT

The Defendant, for its answer to the Second Amended Complaint, says:

1. It is without knowledge or information sufficient to form a belief as to the truth of the averments of Paragraph Two.

2. It denies the allegations of Paragraphs Three and Four except that it is engaged in interstate business in the State of Florida, and avers that it is a Delaware corporation.

3. It denies the allegations of Paragraph Five and Six, except that on August 19, 1969, Leila Mourning, and at various times after July 1, 1969, other persons, executed with Defendant in Dade County, Florida, contracts to which Defendant refers for the terms and conditions thereof.

4. It denies the allegations of Paragraphs Seven, Eight and Nine.

5. It denies the allegations of Paragraph Ten, except that it is in the business of soliciting subscriptions to magazines personally or by telephone and did so act in relation to Plaintiff.

FOR A FIRST DEFENSE, DEFENDANT AVERS:

6. Defendant is in the business of soliciting subscriptions to magazines. By arrangement with various publishers it offers to provide a selection of magazines of varied types. Potential customers are solicited by telephone or personally and offered a contract for the purchase of, usually, five magazines for four or five years at a total cost significantly below that at which those magazines may be purchased on the newstands. Under the contract executed by the customer and Defendant, the customer agrees to pay a stated amount per month for half of the life of the contract and Defendant agrees to supply the magazines for the full term of the contract. At all times the customer has prepaid for the magazines to be delivered. Under its arrangement with most of the publishers, Defendant reimburses the publisher periodically during the full term of the subscription.

7. The transaction between Defendant and its customer is not a "credit transaction" or a "credit sale" and Defendant is not a "creditor" of the subscriber nor does it extend "consumer credit" as those terms are used in 15 U.S.C. § 1601 et seq. At no point during the life of the contract has Defendant paid money to a third person or supplied goods or services to the customer for which reimbursement is expected from the customer in the future.

8. The price paid by the customer for the magazines purchased from Defendant does not include any finance charge, interest, debt service, time-price differential, or any other payment in respect of any extension of credit.

9. The usual transaction between Defendant and its customer is not covered by 15 U.S.C. § 1601 et seq. In particular, the transaction between Defendant and this Plaintiff is not covered by the terms of 15 U.S.C. § 1601, et seq.

10. In good faith Defendant has relied upon a rea-

sonable interpretation of 15 U.S.C. § 1601, et seq., and the regulations promulgated thereunder by the Federal Reserve Board that such statute and regulations are not applicable to it and has not made any of the disclosures required of those to whom such statute is applicable.

FOR A SECOND DEFENSE DEFENDANT AVERS:

11. This Court lacks jurisdiction over the subject matter of this action because, as provided in 15 U.S.C. § 1601, et seq., primary jurisdiction over the controversy is lodged either in the Federal Reserve Board or in the Federal Trade Commission, or in both.

FOR A THIRD DEFENSE DEFENDANT AVERS:

12. Administrative proceedings in the Federal Reserve Board or the Federal Trade Commission or both are superior and available methods for the fair and efficient adjudication of the controversy.

13. This is an action for a civil penalty and as such may be maintained, if at all, only by Plaintiff in her individual capacity.

14. Plaintiff's action may not be maintained, if at all, as a class action.

WHEREFORE, Defendant, Family Publications Service, Inc., demands judgment dismissing this action and the complaint, with its costs and disbursements.

WE HEREBY CERTIFY that a true copy of the foregoing Answer to Second Amended Complaint was mailed on this 20 day of July, 1970, to Philip L. Coller, Esquire, Attorney for Plaintiff, Economic Opportunity Legal Services Program, Inc., 17430 South Dixie Highway, Perrine, Florida.

FRATES FAY FLOYD & PEARSON
Attorneys for Defendant
12th Floor Concord Building
Miami, Florida 33130
By /s/ James D. Little

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 70-559-Civ-WM

REQUEST FOR ADMISSION OF FACTS

LEILA MOURNING, and all persons similarly situated,
PLAINTIFF

v.

FAMILY PUBLICATIONS SERVICE, INC., DEFENDANT

The Plaintiff, LEILA MOURNING, requests the Defendant, FAMILY PUBLICATIONS SERVICE, INC., on or about the 6th day of July, 1970, to make the following admissions under Federal Rules of Civil Procedure, Rule 36 of facts for the purpose of this action only and subject to such pertinent objections to admissibility as may be imposed at the trial.

1. State whether Defendant sent Plaintiff on December 16, 1969, the letter, a copy which is attached hereto and made a part hereof by reference is a true and correct copy.

2. State whether Defendant sent Plaintiff on December 24, 1969, the letter, a copy which is attached hereto and made a part hereof by reference is a true and correct copy.

3. State whether Defendant sent Plaintiff on January 1, 1970, the letter, a copy which is attached hereto and made a part hereof by reference is a true and correct copy.

4. State whether Defendant sent Plaintiff on January 8, 1970, the letter, a copy which is attached hereto and made a part hereof by reference is a true and correct copy.

5. State whether Defendant sent Plaintiff on January 22, 1970, the letter, a copy which is attached hereto and made a part hereof by reference is a true and correct copy.

6. State whether Defendant sent Plaintiff on April 9, 1970, the letter, a copy which is attached hereto and

made a part hereof by reference is a true and correct copy.

7. State whether Defendant sent Plaintiff on May 1, 1970, the letter, a copy which is attached hereto and made a part hereof by reference is a true and correct copy.

8. State whether Defendant sent Plaintiff on June 1, 1970, the letter, a copy which is attached hereto and made a part hereof by reference is a true and correct copy.

9. State whether Defendant sent Plaintiff this invoice (Three Monthly Payments Due this Month), a copy which is attached hereto and made a part hereof by reference is a true and correct copy.

/s/ Philip L. Collier
 PHILIP L. COLLIER, ESQUIRE
 SALLY WEINTRAUB, ESQUIRE
 Attorneys for Plaintiff
 ECONOMIC OPPORTUNITY
 LEGAL SERVICES PROGRAM,
 INC.
 17430 South Dixie Highway
 Perrine, Florida 33157
 Telephone: 233-1850

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing REQUEST FOR ADMISSIONS OF FACTS was mailed to FRATES FAY FLOYD & PEARSON, Twelfth Floor Concord Building, Miami, Florida, 33180, this 22nd day of June, 1970.

/s/ Philip L. Collier
 PHILIP L. COLLIER

Dear Subscriber:

A statement of the amount now due on your magazine contract with us is shown below.

YOUR PROMPT REMITTANCE WILL BE GREATLY APPRECIATED.

Our low prices and convenient terms are available because we rely on the cooperation of our subscribers in making payments promptly as due.

Kindly return your remittance in this envelope. It contains the information we need to properly credit your account.

Cordially yours,

FAMILY PUBLICATIONS SERVICE, INC.

Amount due \$51.35 Date Jun 1 1970

(Taxes included, if Any)

Contract No _____ Route _____

If you wish to pay in full, please remit \$ _____
(Taxes Included, If Any)

If your remittance has been made, please disregard this note and accept our thanks for your payment.

If you wish \$55.30 will pay you thru next month.
(Taxes Included, If Any)

[Illegible figures]—395

**MRS. L. MOURNING
 15295 GARFIELD DR
 HOMESTEAD FL 33030**

C

FPS FAMILY PUBLICATIONS SERVICE, INC.

April 9, 1970

Mr. Philip L. Coller
17430 S. Dixie Hwy.
Pecrine, Florida 33157

RE: Mrs. Leila Mourning
Acct. #1541997

Dear Sir:

Be advised that Family Publications Service, hereafter referred to as FPS, must insist that Mrs. Mourning comply to the terms of her contract.

Whereas, FPS, acts initially as agent for the various publishers; upon acceptance of her contract, FPS thereafter acts solely as financier, and co-guaranter of service with the various publishers; whereas, FPS, has fully invested in Mrs. Mourning's contract and does not receive refund in part or full from any, or, all publishers; for said FPS, investment, we therefore, must insist on compliance of your client to the terms of said contract until fulfillment of said terms in the aforementioned contract result in mutual resolve of liability.

Very truly yours,

FAMILY PUBLICATIONS SERVICE, INC.

/s/ Robert Hibbard
Robert Hibbard
Manager

RH/jmc

Enclosures: copy of contract

Dear Subscriber:

A statement of the amount now due on your magazine contract with us is shown below.

YOUR PROMPT REMITTANCE WILL BE GREATLY APPRECIATED.

Our low prices and convenient terms are available because we rely on the cooperation of our subscribers in making payments promptly as due.

Kindly return your remittance in this envelope. It contains the information we need to properly credit your account.

Cordially yours,

FAMILY PUBLICATIONS SERVICE, INC.

Amount due \$7.90 Date May 1 1970
(Taxes Included, If Any)

Contract No. _____ Route _____

If you wish to pay in full, please remit \$ _____
(Taxes Included, If Any)

If your remittance has been made, please disregard this note and accept our thanks for your payment.

If you wish \$11.85 will pay you thru next month.
(Taxes Included, If Any)

154197-7 395

**MRS. L MOURNING
15295 GARFIELD DR
HOMESTEAD FL 33030**

FBI FAMILY FOUNDATIONS SERVICES 303-435-4000

A statement of the amount now due on your notes
this edition with it is shown below.

12. APPROVED

Our first and foremost task is to make
because of the reputation of our products in
making a name for ourselves as well.

It was found that the
the same as the

It you wish \$1.50 will buy you three more medals.
! Thank you very much for the first medal!

ST-100
 Reproduction copy - INFORMATION & COMM
 THE CLINTONIAN SOCIETY

08093 IT 11-11-1960

FAMILY PUBLICATIONS SERVICE, INC.

Reminder No. 1

INVOICE - Three Monthly Payments Due This Month

Dear Subscriber:

Our Delinquent Department has advised us that your account is in arrears by the AMOUNT DUE shown below. Further delinquency can make the entire balance payable at once. Please remit the AMOUNT DUE by return mail WITH THIS INVOICE in the enclosed envelope herewith.

FAMILY PUBLICATIONS SERVICE, INC.

245 S.E. FIRST STREET
MIAMI FL 33131

THIS BILL MUST BE RETURNED
WITH YOUR PAYMENT

From	Company	City	State	Zip	P.	CC
330	1541	957	28	165	N	3

MRS. L. MURNING
15295 GARFIELD CR
HOMESTEAD FL 33030

PLEASE INDICATE ABOVE
ANY CHANGE OF ADDRESS

PAY THE AMOUNT AND YOUR ACCOUNT WILL BE PAID THROUGH IN NEXT MONTH
IF AMOUNT DUE HAS BEEN PAID, KINDLY DISREGARD THIS NOTICE

330	1541	957	28	165	N	3
PAY THE AMOUNT AND YOUR ACCOUNT WILL BE PAID THROUGH IN NEXT MONTH IF AMOUNT DUE HAS BEEN PAID, KINDLY DISREGARD THIS NOTICE						85411-80 Amt. Due



TO: CHIEF OF POLICE, NEW YORK CITY
 FROM: SAC, NEW YORK (100-100000)
 SUBJECT: [REDACTED]

RE: [REDACTED]
 NEW YORK (100-100000)
 NEW YORK (100-100000)

100-100000	100-100000	100-100000	100-100000
100-100000	100-100000	100-100000	100-100000
100-100000	100-100000	100-100000	100-100000
100-100000	100-100000	100-100000	100-100000

TO: CHIEF OF POLICE, NEW YORK CITY
 FROM: SAC, NEW YORK (100-100000)
 SUBJECT: [REDACTED]

RE: [REDACTED]
 NEW YORK (100-100000)
 NEW YORK (100-100000)

TO: CHIEF OF POLICE, NEW YORK CITY
 FROM: SAC, NEW YORK (100-100000)
 SUBJECT: [REDACTED]

TO: CHIEF OF POLICE, NEW YORK CITY
 FROM: SAC, NEW YORK (100-100000)
 SUBJECT: [REDACTED]

TO: CHIEF OF POLICE, NEW YORK CITY
 FROM: SAC, NEW YORK (100-100000)
 SUBJECT: [REDACTED]

TO: CHIEF OF POLICE, NEW YORK CITY
 FROM: SAC, NEW YORK (100-100000)
 SUBJECT: [REDACTED]

TO: CHIEF OF POLICE, NEW YORK CITY
 FROM: SAC, NEW YORK (100-100000)
 SUBJECT: [REDACTED]

TO: CHIEF OF POLICE, NEW YORK CITY
 FROM: SAC, NEW YORK (100-100000)
 SUBJECT: [REDACTED]

TO: CHIEF OF POLICE, NEW YORK CITY
 FROM: SAC, NEW YORK (100-100000)
 SUBJECT: [REDACTED]

TO: CHIEF OF POLICE, NEW YORK CITY
 FROM: SAC, NEW YORK (100-100000)
 SUBJECT: [REDACTED]

FAMILY PUBLICATIONS SERVICE, Inc.**Jan 22, 1970****Mrs. L. Mourning 1541997
15295 Garfield DR
Homestead, Fl 33080****Contract No.****Dear Subscriber:****The time is here NOW! We cannot wait any longer for your payment.****We give you 48 hours to forward the entire balance of \$118.50.****Our Legal Department has been informed of this matter.****Sincerely,****/s/ A. Carr****A. CARR**

FAMILY PUBLICATIONS SERVICE, Inc.

Jan 8, 1970

Mrs. L. Mourning
15295 Garfield Drive
Homestead, Fla. 33030

DELINQUENT DEPARTMENT**CONTRACT NO. 154199-7****AMOUNT DUE \$19.75****Dear Customer:**

We must have payment on your account this week in order to eliminate your name from appearing on our monthly delinquent report. This report is made up of customers who fail to make their monthly payment. Copies of this report are sent to our attorney and to our home office.

Pay now and avoid the embarrassment of having your name appear on this report. Make all checks or money orders payable to Family Publications Service.

Yours truly,

/s/ C. Bear
C. BEAR

Collection Manager

FAMILY PUBLICATIONS SERVICE, Inc.**Jan 1, 1970****Mrs. L. Mourning 1541997
15295 Garfield Dr
Homestead, Fl 33030****DELINQUENT DEPARTMENT****Re: Contract No.****Amount Due 15.80****Dear Subscriber:**

Frankly, we are reluctant to turn your account over to our attorney for collection. After all, legal action is expensive and unpleasant.

Therefore, we are going to give you every opportunity to avoid outside collection of your account.

It will be necessary for you to do your part. Your check for the amount now due, within the next five days, and satisfactory assurances about paying the balance of the account, are what we consider your part. It's your move next.

Sincerely,

/s/ C. Bear
C. BEAR

FAMILY PUBLICATIONS SERVICE, Inc.

December 24, 1969

Mrs. L. Mourning 1541997
15295 Garfield DR
Homestead, Fl 33080

Contract No. 1541997
Amount Due \$11.85

Dear Subscriber:

I am very much surprised to see that you have not made payment on your magazine account in the past 3 months.

After an account is three months delinquent it is brought to my attention. I feel that you should realize that you are receiving our merchandise which we have paid for. Had you dealt directly with the publishers yourself, you would have had to pay them in advance for the magazines.

Again, let me remind you that we have ordered these magazines in advance and that you have incurred an obligation to repay us. *This is a credit account*, and as such must be repaid by you on a monthly basis, much the same as if you had purchased any other type of merchandise on a monthly budget plan.

I am fully confident that you will realize your obligation and remit your payment. We are allowing you four days from the date of this letter to send your payment to this office before we take other measures to collect your account.

Make your check or money order payable to Family Publications Service, Inc. and mail today.

Respectfully,

/s/ A. Carr
A. CARR

FAMILY PUBLICATIONS SERVICE, INC.**Please Reply To:****Dec 16 1969****Amount Due \$12.33****Contract No. 154199-7****Mrs. L. Mourning
15295 Garfield Dr.
Homestead, Fl. 33080****Dear Subscriber:**

Recently you signed a contract order with us for magazine subscriptions which we appreciate.

As soon as your order reached us—and before the magazines started going to you—we confirmed your order asking you to make any necessary corrections.

After making the terms of our contract clear to you, we went ahead in good faith and had your subscriptions entered for the entire periods you had agreed to take. The contract you signed is: Not subject to cancellation after acceptance or verification.

Knowing, therefore, the obligations we have incurred in your name, we feel confident that you will continue your magazine subscriptions and make the convenient monthly payments regularly and promptly.

The amount necessary to bring your account to date is indicated above. Will you please attach your remittance to this letter and mail it today in the self-addressed envelope attached? Thank you.

Cordially yours,

FAMILY PUBLICATIONS SERVICE, INC.

C22:CC P.S. If you have remitted, please disregard this letter and accept our thanks for your payments.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 70-559-Civ. WM

LEILA MOURNING, and all persons similarly situated,
PLAINTIFF

v.

FAMILY PUBLICATIONS SERVICE, INC., DEFENDANT

RESPONSE TO REQUEST FOR ADMISSION OF FACTS

Family Publications Service, Inc., defendant, makes the following response to the Request for Admission of Facts served upon it by plaintiff on June 22, 1970.

Request No. 1. Admitted.

Request No. 2. Admitted.

Request No. 3. Admitted.

Request No. 4. Admitted.

Request No. 5. Admitted.

Request No. 6. Defendant admits that the letter referred to in Request No. 6 appears on its stationery and was written by its employee Robert Hibbard, but denies that defendant sent plaintiff this letter because Robert Hibbard was not authorized to send said letter.

Request No. 7. Admitted.

Request No. 8. Admitted.

Request No. 9. Admitted.

STATE OF NEW YORK,)

) ss.:

COUNTY OF NEW YORK,)

Stanley R. Swanson, being duly sworn according to law, deposes and says:

1. I am the Vice President of Family Publications Service, Inc., and make this affidavit on its behalf as I am authorized to do.

2. I have read the foregoing Response by Family Publications Service, Inc., to the Request for Admissions filed by the plaintiff. I am familiar with the contents thereof and the same are true to the best of my knowledge, information and belief.

/s/ Stanley R. Swanson
STANLEY R. SWANSON

Sworn to before me this 17th day of July 1970.

MURRAY R. ASOFSKY
Notary Public

FRATES FAY FLOYD & PEARSON
Attorneys for Defendant Family
Publications
12th Floor, Concord Building
Miami, Florida 33130

By /s/ James D. Little
JAMES D. LITTLE

WE HEREBY CERTIFY that a true copy of the foregoing Response to Request for Admissions was mailed on this 20th day of July, 1970 to Philip L. Collier, Esquire, Attorney for Plaintiff, Economic Opportunity Legal Services Program, Inc., 17430 South Dixie Highway, Perrine, Florida.

By /s/ James D. Little
JAMES D. LITTLE

ting the others free. When in fact they were actually paying for the others as well.

3. I believe that if the defendant had made the proper disclosures as the defendant was required to do, under the TRUTH IN LENDING ACT (USC § 1601) and its regulations (Reg. Z) before the contract was consummated (Reg. Z, § 226.8), these individuals would never have signed the contract.

4. Defendant to my knowledge has never registered with the secretary of State of Florida as a foreign corporation, as required under the laws of Florida, but has continued to do business in Dade County for over two years. Defendant, Family Publications Services Inc. last office address was 123 N. W. 79th Street Miami, Florida. Out of this office they ran a collection office for people who had been misled and entered into contracts similar to that of the Plaintiff, Leila Mourning.

5. From our investigation we have learned that the defendant, Family Publications Services Inc., through its collection agents, would not let individuals cancel their contracts and used threatening and harassing tactics, in order to collect on these standard form contracts, which were similar to the one entered into by the plaintiff, Leila Mourning.

6. On July 29, 1970, in Criminal Court Dade County, Florida, The State of Florida, brought suit in Case Number 70-3686 before the Honorable Judge Murray Goodman, which was an action against the Defendant, Family Publications Services Inc. The defendant was charged with misleading advertising and then was convicted along with two of their employees. This standard form contract was a tool used in this deceptive trade practice and has caused damage to numerous individuals in Dade County. The court ordered the defendant, Family Publications Services Inc., to stop doing business in the state.

7. The Defendant, Family Publications Services Inc., is a Delaware Corporation owned solely by Time Inc. of New York, who publishes Time and Life magazines.

8. I believe that my office only receives a small percentage of the complaints made by consumers, who have been damaged in Dade County by the defendant through

their failure to make the disclosures that are required to be made by the defendant under the Truth in Lending Act and its regs. I believe that many people so damaged have not pursued their legal rights because of the small amount they can recover, and could not afford to bring their own suit; that a class action suit is the proper and only remedy to correct this wrong and I believe no private attorney would take this type of suit on an individual basis.

I therefore, urge that this Court permit the plaintiff to maintain her suit as a class action, thereby giving the consumer public of Dade County a measure of protection as intended by the Truth in Lending Act against those who prey on the ignorance of others.

/s/ John C. Mays
JOHN C. MAYS

SWORN to before me this 14th day of August 1970.

/s/ [Illegible]

Notary Public

Notary public, state of Florida at large

My commission expires Apr. 12, 1974

Bonded thru Fred W. Diestelhorst

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 70-559-CIV-WM

AFFIDAVIT OF NEIL ALFORD

LEILA MOURNING, PLAINTIFF

▼

FAMILY PUBLICATIONS SERVICE, INC., DEFENDANT

**AFFIDAVIT IN SUPPORT TO
CLASS ACTION DETERMINATION MOTION**

STATE OF FLORIDA)
) ss.:
COUNTY OF DADE,)

I, NEIL ALFORD, being duly sworn, deposes and says:

I am a citizen of the United States over 21 years of age and a resident of Dade County, Florida. I am presently an inspector for the Consumer Protection Division of Metropolitan Dade County. I am fully familiar with the business practices of the Defendant, Family Publications Service, Inc. I, therefore, make this affidavit in support of the Plaintiff's motion that this Cause be maintained as a class action.

1. I compiled the list of complaints received by our office against Family Publications Service, Inc. (see Exhibit I). This is just a partial list of complaints received by this office against the Defendant.

2. The Defendant, Family Publications Service, Inc., had an office at 123 N. W. 79th Street, out of which their collecting agents worked. These agents were used to collect on contracts, similar to the one entered into by the Plaintiff. In order to collect, the Defendant's agents used threatening and harassing tactics, in order to force compliance with this standard form contract.

3. The complaints received by this office, were that the Defendant represented that the other magazines were free when the consumer purchased Life magazine, when in fact the total cost is much more than a subscription to Life for the five year period.

4. I believe from my investigation that had the Defendant informed the purchaser of the full contract price, the purchaser would not have entered into this contract with the Defendant.

5. I believe that there are numerous others who have been damaged by the Defendant's failure to disclose the information as is required by the Truth in Lending Act. That due to the small amount of recovery numerous individuals have not filed their own actions against the Defendant, Family Publications Service, Inc. I believe that if this suit is allowed to be maintained as a class action, many who have been damaged, will have a forum for their rights to be protected.

/s/ Neil Alford
NEIL ALFORD

SWORN before me this 14th day of August 1970.

/s/ [Illegible]

Notary public, state of Florida at large
My commission expires Apr. 12, 1974
Bonded thru Fred W. Diestelhorst

**COMPLAINTS AGAINST
FAMILY PUBLICATIONS SERVICE, INC.
RECEIVED BY THE DADE COUNTY
CONSUMER PROTECTION DIVISION**

J. H. White	5925 S.W. 72 Avenue
Maude Reeves	2260 N.W. 27 Avenue
Josephine Calais	23800 S.W. 123 Avenue
Diane Taylor	18920 N.W. 8 Avenue
Ann Cullen	1021 N. Greenway Drive, Coral Gables
Franklin Renault	9650 S.W. 102 Avenue Road
Phyllis Greenfield	7700 S.W. 20 Street
B. Metzger	7200 N.W. 169 Terrace
Bernice Patti	18712 N.W. 10 Court
T. Freed	4410 N.W. 191 Terrace
A. B. Shavelson	541 Blue Heron Road, Hallendale, Florida
L. E. McAnally	26235 S.W. 193 Avenue
E. C. Mulrichill	1520 Fletcher Street, Hollywood, Florida
William Raab	7947 N.W. 11 Avenue
M. Newkoap	10541 N.W. 29 Court
Joseph Kloak	1121 Sunset Drive
J. Irio	210 Beacon Blvd.
Gerard Kouwenhoren	7600 N.E. 7 Avenue
Mary Kimbrough	266 Palermo, Coral Gables, Florida
J. Minsky	2360 N.W. 181 Terrace
Robert N. Jerguson	1820 Opa Locka Boulevard
J. Bricke	625 S.W. 3 Street, Hallendale, Florida
Vivien Helvenston	431 Tamiami Boulevard
Jim Dobbins	457 N.W. 57 Avenue, Apt. 23N
Ira Segal	8320 S.W. 92 Terrace
Harold T. Sigel	2431 S. W. 82 Avenue, Ft. Lauderdale, Florida
Carol Christenson	7400 Miami Lake Way, Apt. 263
Ouijano Justo	1000 S.W. 12 Court
Sharon Deckard	3565 N.W. 36 Street
Gregory H. Banks	Box 302, Homestead A.F.B.
John Randelman	7238 S.W. 94 Place, Apt. D4
R. Weathers	3309 Drew Street, Jacksonville, Fla.
Charles Rynn	24 Minorca, Apt. 6, Coral Gables
Leila Mourning	15295 Garfield Drive, Homestead
Mike Sementa	11970 N.E. 19 Drive, Apt. 2
Linda White	6536 S.W. 22 Street, Hollywood, Fla.

- E. D. Davis
 A. Martinez
 Gloria Lupo
 Jack Lopez
 C. H. Hunt
 Robert Jones

 Kenneth Stanaky
 Selma Sanders

 Mike Lemas
 Wilma Jirsa
 R. Robinson
 G. K. Rutberg
 Mary Lee Montgomery
 Sgt. L. F. Burgett
 S. E. Watkins
 Gary Drutser
 Blanca Ortega
 Sgt. James Ward, Jr.

 R. Richmond
 John Henderson
 Dorothy M. Paterson

 J. L. Shuster
 James Morford
 Justine Tune
 Robert Jenkins
 R. J. Bracci
 Myrtle M. Quick
 William Metcalf
 Susan Olson
 M. Gibson
 S. Rentscher
 Beessie Luves
 R. C. Andrews
 Daniel Prevost
 Lorraine Orms
 Roll Harms
 Albert Michel
 Riki Lieberman
 William Shough
 Doris Kinkaid
 Steven Fisher
 W. J. Roberts, Jr.
 Ben Cunningham
 W. Weiss
 L. Bishop
- 10849 S.W. 32 Street
 9211 S.W. 38 Street
 51 W. 19 Street, Hialeah, Florida
 6760 S.W. 19 Street
 14540 N.W. 10 Avenue
 7080 Hood Street, Hollywood,
 Florida
 1055 N.E. 123 Street
 7305 Dickens Avenue, Miami
 Beach, Fla.
 Replica Newspaper
 13810 N.W. 5 Place
 6050 W. First Avenue
 800 W. 53 Street
 2775 W. Okeechobee Road
 Public Safety Department
 2810 S.W. 120 Road
 11051 S.W. 200 Street
 3108 S.W. 13 Street
 1228 N.E. First Street,
 Homestead
 361 N.E. 175 Street
 890 S.E. 3 Place
 4272 Dandridge Street, Palm
 Beach Gardens
 9101 S.W. 16 Street
 1631 N.E. 171 Street
 7221 Bamboo Street
 7050 S.W. 19 Terrace
 11781 S.W. 27 Street
 11344 S.W. 2 Street
 2644 N.W. 22 Court
 11100 S.W. 92 Avenue
 11965 S.W. 188 Street
 515 Cafedonia, Coral Gables
 1524 N.E. 181 Street
 4140 S.W. 98 Court
 777 N.E. 11 Street, Homestead
 9855 S.W. 16 Street
 8490 N.W. 185 Street, Hialeah
 915 N.E. 177 Street
 5731 S.W. 4 Street
 17 Minorca, Coral Gables
 4600 S.W. 115 Avenue
 2179 N.E. 122 Street
 5580 N.W. 173 Drive
 1234 S.W. 13 Avenue
 5161 Collins Avenue, Apt. 509
 560 W. 49 Street, Hialeah

Joseph Solaris
H. Peters

1220 S.W. 16 Avenue
7928 W. Drive, N. Bay Village,
Apt. 704

Jack Foster
Virginia Heath
C. Whitehill
Jose F. Martinez
Walter Alexandrow
L. Langer
Helen Cosby
Fred Wendelkin
Norma Matthews

1481 N.W. 103 Street, Apt. 356E
1918 S.W. 3 Avenue
3220 S.W. 97 Court
262 S.W. 27 Road
9010 S.W. 197 Street
1370 S.W. 16 Street
198 N.W. 46 Avenue, Apt. 23
11880 S.W. 35 Terrace
7205 S.W. 21 Terrace

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

No: 70-559-Civ-WM

Filed November 27, 1970

LEILA MOURNING, on behalf of herself and
all those similarly situated, PLAINTIFFS

v.

FAMILY PUBLICATIONS SERVICE, INC., DEFENDANT

AMENDED ORDER GRANTING FINAL SUMMARY JUDGMENT
TO PLAINTIFF, DENYING DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT AND DISMISSING
CLASS ACTION CLAIM

THIS CAUSE came on to be heard upon the Defendant's motion to amend this Court's Order and judgment entered October 30, 1970, and the Court having heard argument of counsel, and having considered the memoranda submitted by counsel for the parties, and being otherwise fully advised in the premises,

The Court finds that the Plaintiff, LEILA MOURNING, cannot fairly and adequately protect the interests of the alleged class in this cause, and any previous order herein to the contrary is superceded by this Order and Judgment, and it is therefore,

ORDERED AND ADJUDGED that this action shall not be maintained as a class action, and the class action claim

of the "second amended complaint" is hereby dismissed, and it is further,

ORDERED AND ADJUDGED that this Court's Order of October 30, 1970, be and it is hereby vacated and amended to state as follows:

THIS CAUSE having come on before me upon Motions for Summary Judgment filed by the parties, Philip L. Collier, Esq. of the Legal Services Senior Citizens Center, and M. Donald Drescher, Esq., appearing for the Plaintiff, and Peter Fay, Esq. of Frates Fay Floyd & Pearson, P.A., appearing for the Defendant, and the Court having heard argument of counsel and being otherwise fully advised in the premises, makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

This action is founded on the Consumer Credit Protection Act (Title I, Truth in Lending Act) 15 USC § 1601 et seq., and the Regulations duly promulgated thereunder by the Board of Governors of the Federal Reserve System (Regulation Z, 12 CFR §§ 226.1-226.12). The relief sought is recovery of a civil penalty imposed by the Act for failure to make disclosures required by the Act and its Regulations.

There is no issue as to any material fact. Defendant admits (1) that it entered into a written standard form contract with the named Plaintiff and other members of this class; and (2) that the standard form contract did not contain the disclosures specified by the Truth in Lending Act. Further, Defendant admits contacting the named Plaintiff on several occasions subsequent to the filing of this suit to enforce collection of a debt asserted by Defendant against the Plaintiff. Defendant is engaged in the interstate business of soliciting subscriptions to magazines and offering contracts therefor. The contract on its face provides that the customer agrees to pay a stated sum over a period of 24 or 30 months, that it is non-cancellable and that "Payments due monthly, otherwise entire balance due."

Plaintiff Lella Mourning entered into a standard form contract with the Defendant on August 19, 1969. Subsequent to July 1, 1969, the date the Act went into effect, a number of other individuals in Dade County entered into identical or similar contracts with the Defendant.

The sole question presented is: "Does the transaction here sued upon come within the scope of the Truth in Lending Act and the Regulations duly promulgated thereunder?"

CONCLUSIONS OF LAW

A. The Truth in Lending Act and the Regulations must be interpreted so as to be consistent with each other and with the declared Congressional purpose of the Act—"to assure meaningful disclosure of credit terms."

B. The uncontroverted evidence before the Court plainly demonstrates that it is the intent of the Regulation and the interpretation of the Federal Reserve Board and of the staff of the Federal Trade Commission that the transaction here in question falls squarely within the scope of the Act and its Regulations by virtue of the "more than four installments" rule, 12 CFR § 226.2(k); F.R.B. Letter, July 24, 1969, 1 CCH, *Consumer Credit Guide*, §§ 30,118,114; FTC Letter, September 3, 1970 (in Court file); *CLE, TRUTH IN LENDING IN FLORIDA*, Chapter 2.2(D); *Tanner, Truth in Lending and Regulation Z—A Primer*, 6 Ga. S.B.J. 1 (Aug. 1969).

C. The uncontroverted facts show that Consumer credit was extended by the Defendant to the Plaintiff. The Plaintiff received a present contract right—a subscription, in exchange for a promise to pay a certain sum in more than four installments. The promise to pay is unconditional and non-cancellable, and, further, the written agreement provides that "Payments due monthly, otherwise entire balance due." The evidence before the Court regarding the named Plaintiff reveals that the Defendant, itself, considered the transaction to be a credit transaction, and that it was owed a debt by the Plaintiff.

D. No constitutional question is presented by the case at bar.

E. The answer to the question presented to the Court must be "yes," and since the Defendant has extended "Consumer credit" within the meaning of the Truth in Lending Act and its Regulations and has failed to make the material disclosures required by 15 USC § 1631 and 12 CFR § 226.8, the Defendant is liable to the Plaintiff for the penalties imposed by 15 USC § 1640(a).

Accordingly, it is ORDERED AND ADJUDICATED:

1. That the motion of Plaintiff, LEILA MOURNING, for summary judgment be and the same is granted and the Defendant's motion for summary judgment is denied.

2. That as a penalty for its failure to provide the disclosures required by the Act and its Regulations, the Defendant shall pay to the Plaintiff, LEILA MOURNING, the sum of One Hundred Dollars (\$100.00).

3. That the Clerk of this Court shall enter final judgment in favor of Plaintiff, LEILA MOURNING, against the Defendant, FAMILY PUBLICATIONS SERVICE, INC., in the amount of One Hundred Dollars (\$100.00), plus 1500.00 on behalf of Plaintiff, LEILA MOURNING, as a reasonable attorneys' fee and the costs of this action.

DONE AND ORDERED in Chambers at Miami, Florida, on this 27th day of November, 1970.

/s/ W. Mehrtens
W. MEHRTENS
United States District Judge

**UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA**

Civil Action File No. 70-559-Civ-WM

Filed November 27, 1970

[TITLE OMITTED]

JUDGMENT

This action came on for hearing before the Court, Honorable William O. Mehrrens, United States District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered, that the motion of plaintiff, LEILA MOURNING, for summary judgment is GRANTED and defendant's motion for summary judgment is DENIED.

It is Ordered and Adjudged that the plaintiff, LEILA MOURNING, recover from the defendant, FAMILY PUBLICATIONS SERVICE, INC., the sum of One Hundred and 00/00 Dollars (\$100.00), plus One Thousand Five Hundred and 00/00 Dollars (\$1500.00) on behalf of plaintiff, LEILA MOURNING, as a reasonable attorneys' fee and the cost of this action.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

NO: 70-559-Civ-WM

[TITLE OMITTED]

Filed December 11, 1970

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that FAMILY PUBLICATIONS SERVICE, INC., Defendant above named, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the Amended Order Granting Final Summary Judgment to Plaintiff and Denying Defendant's Motion for Summary Judgment, and Judgment for Plaintiff, LEILA MOURNING, against Defendant, FAMILY PUBLICATIONS SERVICE, INC., entered in this action on the 27th day of November, 1970.

DATED at Miami, Florida, on this 11 day of December, 1970.

FRATES FLOYD PEARSON &
STEWART

Attorneys for Defendant
12th Floor, Concord Building
Miami, Florida 33130

By /s/ L. Edward McClellan Jr.

FEDERAL TRADE COMMISSION

Washington, D.C. 20580

Bureau of
Consumer Protection

Sept 3 1970

Mr. Phillip L. Coller
Attorney at Law
Legal Service Senior Citizens Center
Suite 309, Harvey Building
1370 Washington Avenue
Miami Beach, Florida. 33139

Dear Mr. Coller:

This is in response to your letter of August 31, 1970, inquiring as to whether a seller who, by agreement, allows payment in 36 monthly instalments but imposes no finance charge, is a "creditor" under the Truth in Lending Act. You also noted the seller's claim that because the service extends over six years and is repayable in three there is no credit extended.

Your question brings to light an apparent inconsistency involving the definition of creditor provided by the Statute and that provided by Regulation Z, the implementing Regulation of the Act. Section 103 of the Statute states that "the term creditor refers only to creditors who regularly extend . . . credit for which the payment of a finance charge is required . . .". Section 226.2(m) of Regulation Z defines "creditor" as "a person who in the ordinary course of business regularly extends . . . consumer credit . . .". "Consumer credit" is defined by Section 226.2(k), in part, as "credit offered or extended to a natural person . . . for which either a finance charge is or may be imposed or which, pursuant to an agreement, is or may be payable in more than 4 instalments" (emphasis supplied).

Section 105 of the Statute delegates authority to the Board of Governors of the Federal Reserve Board to prescribe regulations to carry out the purposes of the Act.

It further states that "these regulations may contain such classifications, differentiations, or other provision... as in the judgment of the Board are necessary or proper to effectuate the purposes of this title, to prevent circumvention or evasion thereof, or to facilitate compliance therewith". It is the unanimous opinion of the staff that the "more than four instalments" provision of the Regulation is in furtherance of those purposes and that a seller who allows payment in more than four instalments comes within the scope of the Truth in Lending Act and its Regulation, notwithstanding the absence of a finance charge.

The seller's contention that because the charges for three of the six years of service are prepaid there is no credit extended is wholly without merit. As long as the seller, by agreement, allows the purchaser to defer payment of the debt over more than four instalments he is extending consumer credit.

The above comments constitute informal staff opinion which is advisory in nature and is in no way binding upon the Commission.

Your inquiry is appreciated.

Very truly yours,

/s/ Lewis H. Goldfarb,
LEWIS H. GOLDFARB,
Attorney,
Division of Special Projects.

cc: Mr. John B. White,
Attorney in Charge,
Federal Trade Commission,
730 Peachtree Street, N.E.,
Room 720,
Atlanta, Georgia. 30303

**Opinion of United States Court of Appeals
For the Fifth Circuit**

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 71-1150

LEILA MOURNING, ET AL., PLAINTIFFS-APPELLEES

v.

**FAMILY PUBLICATIONS SERVICE, INC.,
DEFENDANT-APPELLANT**

**APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA**

(September 27, 1971)

Before

COLEMAN, SIMPSON, and RONEY,

Circuit Judges.

COLEMAN, Circuit Judge: The validity of Regulation Z,¹ promulgated by the Federal Reserve Board under the Truth-In-Lending Act,² is the material issue in this appeal. The District Court held for validity. We reverse.

¹ 12 C.F.R. 226.

² 15 U.S.C. § 1601, et seq.

I

The Facts

Appellant, Family Publications Service, Inc., is a Delaware Corporation engaged in the interstate business of soliciting subscriptions and offering contracts for the sale and delivery of a large number of well known periodicals.

The appellee Lella Mourning, is a seventy-three year old widow having her domicile in Dade County, Florida.

Under appellant's method of conducting its business for the sale and delivery of well known periodicals, the customer under a standard form contract agrees to receive his particular magazine selections for 48 (or 60) months and to pay for them over the first 24 (or 30) months. Under normal operating circumstances, the appellant expects to receive a prepayment for magazines to be delivered to the customer in the future. The only circumstances in which magazines are occasionally delivered prior to appellant's receipt of payment for them is when a customer defaults in making the prepayment. According to the appellant, these transactions, contractual in nature, for the sale and delivery of magazines do not involve the extension of credit as defined by the Truth-In-Lending Act or the imposition of a finance charge, either directly or indirectly, requiring the disclosures specified in the Truth-In-Lending Act.

On August 19, 1969, appellee entered into a written contract with the appellant for the purchase of the *Ladies Home Journal*, *Holiday*, *Life*, and *Travel and Camera*. As usual, the standard form contract required the appellee to make thirty monthly payments of \$3.95 each, in return for which she would receive magazines for sixty months. The contract provided that it was non-cancellable and that failure to make the monthly payments would result in the entire balance becoming due. Said contract is the only instrument executed and existing between the parties and it does not contain a disclosure as to the total purchase price, finance charges, service charges, or the amount to be financed.

Although Lella Mourning, the appellee, received the magazines ordered, she defaulted on her contract and

never made any payments beyond the initial \$8.95. Consequently, her contract was cancelled by Family Publications Service, Inc., on April 15, 1970. Appellant admits contacting the named appellee on several occasions seeking to enforce the contract. In those letters, appellant explained that it had already entered her subscriptions for the entire period; that it was a financier which had fully invested in her contract and would not receive a refund from the publishers; that Mrs. Mourning would have had to pay in advance had she dealt directly with the publishers; that she had an obligation to repay appellant on her "credit" account, much the same as if she had purchased any other type of merchandise; and that the entire balance of \$118.50 was due.

On April 23, 1970, Mrs. Mourning filed her civil suit asserting that the appellant, Family Publications Service, Inc., had failed to make the disclosures required by the Truth-In-Lending Act and, on that basis seeking the civil penalty, including the attorney's fees, prescribed by the Act.

II

The Decision of the District Court

Both Mrs. Mourning and Family Publications, Inc. moved for summary judgment. The judgment went to the plaintiff, in the following language:

"THIS CAUSE having come on before me upon Motions for Summary Judgment filed by the parties, Philip L. Coller, Esq. of the Legal Services Senior Citizens Center, and M. Donald Drescher, Esq., appearing for the Plaintiff, and Peter Fay, Esq. of Frates Fay Floyd & Pearson, P.A., appearing for the Defendant, and the Court having heard argument of counsel and being otherwise fully advised in the premises, makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

"This action is founded on the Consumer Credit Protection Act (Title I, Truth in Lending Act) 15 USC § 1601 et seq., and the Regulations duly promulgated thereunder by the Board of Governors of the Federal Reserve System (Regulation Z, 12 CFR §§ 226.1-226.12). The relief sought is recovery of a civil penalty imposed by the Act for failure to make disclosures required by the Act and its Regulations.

"There is no issue as to any material fact. Defendant admits (1) that it entered into a written standard form contract with the named Plaintiff and other members of this class; and (2) that the standard form contract did not contain the disclosures specified by the Truth in Lending Act. Further, Defendant admits contacting the named Plaintiff on several occasions subsequent to the filing of this suit to enforce collection of a debt asserted by Defendant against the Plaintiff. Defendant is engaged in the interstate business of soliciting subscriptions to magazines and offering contracts therefor. The contract on its face provides that the customer agrees to pay a stated sum over a period of 24 or 30 months, that it is non-cancellable and that 'Payments due monthly, otherwise entire balance due'.

"Plaintiff Leila Mourning entered into a standard form contract with the Defendant on August 19, 1969. Subsequent to July 1, 1969, the date the Act went into effect, a number of other individuals in Dade County entered into identical or similar contracts with the Defendant.

"The sole question presented is: 'Does the transaction here sued upon come within the scope of the Truth in Lending Act and the Regulations duly promulgated thereunder?'

CONCLUSIONS OF LAW

"A. The Truth in Lending Act and the Regulations must be interpreted so as to be consistent with each other and with the declared Congressional pur-

pose of the Act—to assure meaningful disclosure of credit terms.’

“B. The uncontroverted evidence before the Court plainly demonstrates that it is the intent of the Regulation and the interpretation of the Federal Reserve Board and of the staff of the Federal Trade Commission that the transaction here in question falls squarely within the scope of the Act and its Regulations by virtue of the ‘more than four installments’ rule, 12 CFR § 226.2(k); F.R.B. Letter, July 24, 1969, 1 CCH, *Consumer Credit Guide*, §§ 30,113, 30,114; FTC Letter, September 3, 1970 (in Court file); *CLE, TRUTH IN LENDING IN FLORIDA*, Chapter 2.2 (D) *Tanner, Truth in Lending and Regulation Z—A Primer*, 6 Ga. S.B.J. 1 (Aug. 1969).

“C. The uncontroverted facts show that Consumer credit was extended by the Defendant to the Plaintiff. The Plaintiff received a present contract right—a subscription, in exchange for a promise to pay a certain sum in more than four installments. The promise to pay is unconditional and non-cancellable, and, further, the written agreement provides that ‘Payments due monthly, otherwise entire balance due’. The evidence before the Court regarding the named Plaintiff reveals that the Defendant, itself, considered the transaction to be a credit transaction, and that it was owed a debt by the Plaintiff.

“D. No constitutional question is presented by the case at bar.

“E. The answer to the question presented to the Court must be ‘yes,’ and since the Defendant has extended ‘Consumer credit’ within the meaning of the Truth in Lending Act and its Regulations and has failed to make the material disclosures required by 15 USC § 1631 and 12 CFR § 226.8, the Defendant is liable to the Plaintiff for the penalties imposed by 15 USC § 1640(a).

“Accordingly, it is ORDERED AND ADJUDICATED:

“1. That the motion of Plaintiff, LILLA MOURNING, for summary judgment be and the same is

granted and the Defendant's motion for summary judgment is denied.

"2. That as a penalty for its failure to provide the disclosures required by the Act and its Regulations, the Defendant shall pay to the Plaintiff, LEILA MOURNING, the sum of One Hundred Dollars (\$100.00).

"3. That the Clerk of this Court shall enter final judgment in favor of Plaintiff, LEILA MOURNING, against the Defendant, FAMILY PUBLICATION SERVICE, INC., in the amount of One Hundred Dollars (\$100.00), plus 1500.00 on behalf of Plaintiff, LEILA MOURNING, as a reasonable attorneys' fee and the costs of this action."

We have included the Findings and Conclusions because they reveal the absence of any finding that a finance charge was involved in this transaction. The defendant's answer denied the existence of such a charge, and the plaintiff did not traverse it. The long and the short of it is that the plaintiff and the court stood on the Regulation.

III

The Truth-In-Lending Act, Its Statutory Scheme, and Regulation Z

Recognizing that the full disclosure of finance charges would greatly aid consumers in deciding for themselves the reasonableness of the credit charges imposed and would thereby enable consumers to effectively shop for credit, the Truth-In-Lending Act, Title I of the Consumer Credit Protection Act, Public Law 90-321, 82 Stat. 146, was enacted by the Congress, establishing the statutory requirement that as a matter of fair play to the consumers the cost of credit should be disclosed fully, simply, and clearly. United States Code Congressional and Administrative News, 90th Congress, Second Session (1968), pp. 1962, 1965. It was the feeling of the Congress that "the informed use of credit results from

an awareness of the cost thereof by consumers". 15 U.S.C., § 1601.

The basic thrust of the Truth-In-Lending Act is that each creditor who regularly extends, or arranges for his debtors in consumer transactions to defer payment of debt or to incur debt and defer its payment and who *thereby as an incident to such extension or arrangement for the deferred payment of debt imposes either directly or indirectly a finance charge for such deferred debt*, shall disclose clearly and conspicuously, in accordance with the regulations of the Board of Governors of the Federal Reserve System, to each person to whom such right of deferred payment of debt is granted and upon which right a finance charge is or may be imposed, the information required by 15 U.S.C., § 1638(a), 15 U.S.C., § 1602(e) and (f), § 1605(a), § 1631(a). According to such section, 15 U.S.C., § 1638(a), in any consumer transaction, not under an open end credit plan, where the debtor is granted the right to defer payment of debt or to incur debt and defer its payment, *and for which right the payment of a finance charge is required of the debtor by the creditor*, the creditor shall disclose each of the following items:

1. The cash price of the item purchase, 15 U.S.C., § 1638(a) (1).
2. The amount of the down payment, 15 U.S.C., § 1638(a) (2).
3. The difference between the cash price of the item purchased and the amount of the down payment, 15 U.S.C., § 1638(a) (3).
4. All additional charges, individually itemized, which are included in the amount of the credit extended but which are not part of the finance charge, 15 U.S.C., § 1638(a) (4).
5. The total amount to be financed (the sum of #3 and #4), 15 U.S.C., § 1638(a) (5).
6. Amount of the finance charge, 15 U.S.C., § 1638(a) (6).
7. The annual percentage rate of the finance charge, 15 U.S.C., § 1638(a) (7).

8. The schedule of payments required, 15 U.S.C., § 1638(a) (8).
9. The charges for late payments, 15 U.S.C., § 1638 (a) (9).
10. A description of any security interest involved, 15 U.S.C., § 1638(a) (10).

In order to assure the effective operation of the statutory provisions of the Act and to assure the meaningful disclosures of credit terms so that all consumers would be able to compare more readily the various credit terms available and thereby avoid the uninformed use of credit, the Act delegated to the Board of Governors of the Federal Reserve System the authority to promulgate regulations to accomplish the above-mentioned objectives, 15 U.S.C., § 1604. This section expressly authorized the Board of Governors to promulgate regulations containing such classifications, differentiations, or other provisions, and providing for such adjustments and exceptions for any class of transactions, as in the judgment of the Board of Governors are necessary or proper to effectively effectuate the purposes of the Truth-In-Lending Act, to prevent the circumvention or evasion of such statutory provisions, or to facilitate compliance with such provisions. In connection with the Truth-In-Lending Act's delegation of authority to promulgate regulations, the Act provided that any reference in the Act to requirements imposed by the Act included reference to the Board of Governor's regulations, 15 U.S.C., § 1602 (k).

In addition to the specification in the Truth-In-Lending Act of criminal penalties for the wilful and knowing failure of a creditor to make the required disclosures of 15 U.S.C., § 1638(a), or for failing to comply with any other requirements of the Act, 15 U.S.C., § 1611, the Act established two methods of civil enforcement. One is administrative in nature and is vested (1) in a number of federal agencies which already exercised jurisdiction by virtue of other statutory authority, over particular classes of creditors, 15 U.S.C., § 1607(a), and (2) in the Federal Trade Commission with respect to all other creditors, 15 U.S.C. § 1607(c).

The other civil remedy established by Congress was made available directly to consumers. Specifically, the Act established federal court jurisdiction over actions for a civil penalty and authorized the courts, in successful actions, to award the consumer a reasonable attorneys' fee, 15 U.S.C., § 1640(a) and (e). The amount of the civil penalty was set at "an amount equal to the sum of twice the amount of the finance charge in connection with the transaction", except that the penalty could not be less than \$100 nor greater than \$1,000, 15 U.S.C., § 1640(a).

The Four Installment Rule of Regulation Z

On February 10, 1969, the Board of Governors of the Federal Reserve System implemented the Act by promulgating a set of regulations dealing comprehensively and thoroughly with all aspects of the Truth-In-Lending Act.

Within these regulations there was included a provision that the Board of Governors of the Federal Reserve System determined that the Act's disclosure requirements would be applied not only to those creditors who extend consumer credit which involves an expressly stated finance charge, but also those who extend consumer credit for which no finance charge is stated but which pursuant to agreement, is or may be payable in more than four installments.

The purpose, indeed the inescapable result of the Regulation, is the imposition of a conclusive presumption that those who extend credit and permit payment in four or more installments have added a finance charge for the extension of credit.

The primary question, then, is: Was such a requirement within the delegated authority of the Board?

IV

Our Decision

As already stated, the Act requires that "each creditor shall disclose clearly and conspicuously, in accordance with the regulations of the Board, to each person to whom consumer credit is extended and upon whom a

finance charge is or may be imposed, the information required under 15 U.S.C., § 1638(a)." 15 U.S.C., § 1631 (a). For failure in connection with any consumer credit transaction to disclose to any person required by 15 U.S.C., § 1638(a), the Truth-In-Lending Act imposes on such creditor civil liability, 15 U.S.C., § 1640, and in cases of wilful and knowing violation of the disclosure requirement, criminal liability, 15 U.S.C., § 1611. This particular action was brought under the civil liability provisions.

Mindful of the Supreme Court's decision in *Federal Communication Commission v. American Broadcasting Company*, 347 U.S. 284, 290 (1954), that penal statutes are to be strictly construed, and mindful that it is the duty of the judiciary to finally determine the proper construction of statutes, the Court construes 15 U.S.C., § 1631 to require that three essential elements must be found present together in a transaction before a person is obligated under the Truth-In-Lending Act to make the information disclosures listed in 15 U.S.C., § 1638(a). These three essential elements consist of the following:

First, there must be found present a *creditor* as defined by the Act, or a person who regularly extends or arranges for the extension of the right to defer payment of debt, or to incur debt and defer its payment, and for which right of deferred payment the payment of a finance charge is required, 15 U.S.C., § 1602(e) and (f).

Secondly, there must be found present a *consumer credit* transaction as defined by the Act, or a transaction in which the person to whom is extended the right to defer payment of debt or to incur debt and defer its payment is a natural person, and the money, property, or services which are the subject of the transaction are primarily for personal, family, household or agricultural purposes, 15 U.S.C., § 1602(e) and (h).

Thirdly, there must be found present a "*finance charge*" as defined by the Act, 15 U.S.C., § 1605(a), and § 1602 (e) and (f).

Regulation Z provides:

"Consumer credit means credit offered or extended to a natural person, in which the money, property,

or service which is subject of the transaction is primarily for personal, family, household, or agricultural purposes for which either a finance charge is or may be imposed or which, pursuant to an agreement, is or may be payable in more than four installments."

According to the brief of the United States as amicus curiae, the four installment rule in effect establishes a conclusive presumption that those who extend credit and allow payment in four or more payments have included within the price which the consumer pays for their product their cost of extending credit, notwithstanding that they purport not to levy a finance charge. Therefore, we can conclude from the Regulation promulgated by the Board of Governors of the Federal Reserve System, from the decision of the lower district court, and from the brief filed in this cause by the United States as amicus curiae, that in order for the disclosure and penalty provisions of the Truth-In-Lending Act to be applicable, all that is required is that the transaction involve the extension of credit which, pursuant to agreement, is or may be payable in more than four installments. No showing or finding of the imposition, directly or indirectly, of a finance charge is necessarily required. The presence of a finance charge is conclusively presumed from the nature of the transaction, involving payment in more than four installments.

It can be readily seen from a consideration of the four installment rule of Regulation Z as defined by the appellee and from a consideration of this Court's construction of the statutory provisions of the Truth-In-Lending Act that an inconsistency exists between the four installment rule and the Truth-In-Lending Act. On the one hand, the four installment rule requires the application of the disclosure and penalty provisions of the Truth-In-Lending Act to transactions involving the extension of credit which, pursuant to agreement, is or may be payable in more than four installments, *whether or not a finance charge is proven to have been imposed*, directly or indirectly, as an incident to the extension of credit. On the other hand, the statutory provisions of the Truth-

In-Lending Act requires that a finance charge must be found present, directly or indirectly, along with the other two essential elements in a transaction before such transaction is considered to be subject to the penalty and disclosure provisions of the Truth-In-Lending Act.

By extending the applicability of the disclosure and penalty provisions of the Truth-In-Lending Act to transactions involving the extension of credit repayable by agreement in more than four installments, whether or not there is found in such transactions the imposition of a finance charge as an incident to the extension of credit, the Board of Governors, in our opinion, over-stepped the authority granted to them under 15 U.S.C., § 1604. The authority delegated to the Board of Governors to prescribe such regulations as they deem necessary and proper to further the purposes of the Act and to prevent the circumvention of the Act did not include the authority to make subject to the disclosure and penalty provisions of the Act transactions not involving the imposition of a finance charge, and therefore not covered within the scope of the Act.

"The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law—for no such power can be delegated by Congress—but the power to adopt regulations to carry into effect the will of the Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute is a mere nullity", *Manhattan General Equipment Company v. Commissioner of Internal Revenue*, 297 U.S. 129, 134, 56 S.Ct. 397, 399, 80 L.Ed. 528 (1935).

We therefore hold that the four installment rule of Regulation Z constituted an administrative endeavor to amend the law as enacted by the Congress and to thereby make the Act reach transactions which the Congress by its statutory language did not seek or intend to cover by its enactment. The effect of such an effort comes within the condemnation of decisions of the Supreme Court. This condemnation is exemplified by *Commissioner of Internal Revenue v. Acker*, 361 U.S. 87, 80 S.Ct. 144, 4 L.Ed.2d 127 (1959), where the Court stated:

"But the section contains nothing to that effect, and therefore, to uphold this addition to the tax would be to hold that it may be imposed by regulation, which, of course, the law does not permit. *United States v. Calamaro*, 354 U.S. 351, 359; *Koshland v. Helvering*, 298 U.S. 441, 446, 447; *Manhattan Co. v. Commissioner*, 297 U.S. 129, 134."

Equally applicable to the above holdings of the United States in this Court's opinion in *United States v. Marett*, 5 Cir., 1963, 325 F.2d 28, 30, 31.

As previously noted, the four installment rule of Regulation Z which decrees that those who extend credit and permit payment in more than four installments have included within the price which the consumer pays for their product their cost of extending credit, notwithstanding that they purport not to levy a finance charge, creates a conclusive or irrebuttable presumption. Such a presumption states a rule of substantive law. This is in contrast to a rebuttable presumption which only states a rule of evidence and which the opposing party is entitled to overcome by proof. The Supreme Court has held that a statute which creates a conclusive presumption contravenes the Fourteenth Amendment, if enacted by the State Legislature. It violates the Fifth Amendment if enacted by the Congress.

In *Schlesinger v. State of Wisconsin*, 270 U.S. 280, 46 S.Ct. 260, 70 L.Ed. 557 (1926), the Supreme Court struck down as violative of the Fourteenth Amendment a statute of the State of Wisconsin which provided in effect that gifts of a decedent estate made within six years of death were made in contemplation thereof. The Court, 270 U.S., at page 239, 46 S.Ct., at page 261, stated:

"The challenged enactment plainly undertakes to raise a conclusive presumption that all material gifts within 6 years of death were made in anticipation of it and to lay a graduated tax upon them without regard to the actual intent. The presumption is declared to be conclusive and cannot be overcome by evidence. It is no mere prima facie presumption of fact."

The judgment of the District Court is reversed and remanded with directions that the complaint be dismissed.

REVERSED and REMANDED With Directions.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1970

No. 71-1150

D. C. Docket No. Civ. 70-559-WM

LEILA MOURNING, ET AL, PLAINTIFFS-APPELLEES

v.

FAMILY PUBLICATIONS SERVICE, INC.,
DEFENDANT-APPELLANT

*Appeal from the United States District Court for the
Southern District of Florida*

Before COLEMAN, SIMPSON and RONEY, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby remanded to the said District Court with directions that the complaint be dismissed.

September 27, 1971

Issued As Mandate: Oct 19 1971

SUPREME COURT OF THE UNITED STATES**No. 71-829****LEILA MOURNING, PETITIONER****v.****FAMILY PUBLICATIONS SERVICE, INC.****ORDER ALLOWING CERTIORARI. Filed March 20, 1972.**

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted.